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IN THE

Supreme Court of the United States

October Term, 1964

No. 534

ANTHONY PROVENZANO,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

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INDEX

	PAGE
Opinion Below	1
Argument	1
1. Question relating to the element of interference with commerce	1
2. Questions of knowledge, intent and aiding and abetting	3
3. Access to Grand Jury Testimony of Key Government Witnesses	7
4. Sequestration of the Jury	7
5. Unit of Prosecution	9
6. Restriction of cross-examination	10
7. Reasonable fear	10
8. Refusal to submit issue of bribery	11
Conclusion	12

Authorities Cited

Cases

Anderson v. United States, 262 F. 2d 764 (8th Cir. 1959), cert. den. 360 U.S. 929	2
Bianchi v. United States, 219 F. 2d 182 (8th Cir. 1955), cert. den. 349 U.S. 915	11
Golden v. United States, 318 F. 2d 357 (1st Cir. 1963)	7
Hulahan v. United States, 214 F. 2d 441 (8th Cir. 1954), cert. den. 348 U.S. 856	2
Ingram v. United States, 360 U.S. 672 (1959)	4

PAGE

Keen v. Overseas Tankship Corp., 194 F. 2d 515 (2d Cir. 1952) 10

Lawn v. United States, 355 U.S. 339 (1958) 7

Meredith v. United States, 238 F. 2d 535 (4th Cir. 1956) 5

Perez v. United States, 297 F. 2d 12 (5th Cir. 1961) 11

Silber v. United States, 370 U.S. 717 (1962) 5

Stirone v. United States, 361 U.S. 212 (1960) 2

Sweeney v. United Feature Syndicate, 129 F. 2d 904 (2d Cir. 1942) 6

Tatum v. United States, 190 F. 2d 612 (D.C. Cir. 1951) 11

United Brotherhood of Carpenters v. United States, 330 U.S. 395 (1947) 5

United States v. Blount, 229 F. 2d 669 (2d Cir., 1956) 11

United States v. Currens, 290 F. 2d 751 (3d Cir. 1961) 6, 7

United States v. Kelinson, 205 F. 2d 600 (2d Cir. 1953) 6

United States v. O'Connor, 237 F. 2d 466 (2d Cir. 1956) 11

United States v. Tolub, 309 F. 2d 286 (2d Cir. 1962) 9

Federal Rules of Criminal Procedure

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Opinion Below

The opinion of the Court of Appeals (Pet., App. B), is reported at 334 F. 2d 678.

Argument

1. Question relating to the element of interference with commerce (Pet., pp. 11-14).

The question here presented is, *not*, as suggested by the Government (br., p. 16), whether an *actual* obstruction of interstate commerce must be shown, but whether it is essential for the jury to find, on sufficient evidence, in order to satisfy the jurisdictional element of interference with commerce, that there was at least a *threatened* obstruction of commerce and that "*commerce was saved from such a block-*

age by [the victim's] compliance with [the defendant's] coercive and illegal demands''. See *Stirone* v. *United States*, 361 U.S. 212, 215 (1960).

The Government urges the adoption of the novel concept applied by the courts below that the mere payment of money through extortion by a company engaged in interstate commerce is itself a sufficient interference with commerce. No such concept has heretofore been advanced in Hobbs Act prosecutions, and the cases cited by the Government (*Anderson* v. *United States*, 262 F. 2d 764, 770 [8th Cir. 1959], cert. den. 360 U.S. 929; *Hulahan* v. *United States*, 214 F. 2d 441, 445 [8th Cir. 1954], cert. den. 348 U.S. 856), in no way stand for that proposition. It was there held merely that it was not necessary to show an *actual* obstruction of commerce—a proposition with which petitioner does not quarrel. Neither case disputes that separate and apart from the element of extortion, there must be a finding of acts on the part of the defendant constituting at least threatened interference with interstate commerce, as this Court ruled in *Stirone* (361 U.S. at 215).

In an attempt to bolster its position, the Government urges that on the record in this case ''the jury might reasonably find that a serious interruption to the flow of goods was the consequence with which Dorn was threatened if he refused to pay''. The Government, however, completely ignores the crucial consideration that that issue was not submitted to the jury at all (Pet., pp. 12-13). The bulk of the trial was devoted to the congestion issue, and petitioner presented a strong defense on that issue, but the Trial Court erroneously charged the jury that the evidence of congestion did ''not bear directly'' on the issue of interference with

commerce (711a),[1] and thereby removed from the jury's consideration an essential element of the crime and deprived petitioner of a vital facet of his defense.

2. Questions of knowledge, intent and aiding and abetting (Pet., pp. 14-18).

A

The Government's brief (p. 14) is significantly silent with respect to the significance of the absence of any evidence to show that petitioner in any way conspired or collaborated with Communale or even knew him, or had any knowledge that Communale was receiving retainer payments without rendering services therefor, or that Communale was retained or receiving payments at all, or that petitioner intended or contemplated that Communale was to be retained on any such basis, or that petitioner derived any direct or indirect benefit from such payments.

The Government further ignores Dorn's own unequivocal testimony that though he and petitioner met on many occasions after he allegedly received Communale's name from petitioner, no mention was ever again made of Communale's name or of the retainer arrangement or payments at any of such meetings; that he never told petitioner that he was sending checks to Communale; that petitioner had nothing to do with the increase of the monthly retainer payments for a short period from $200 to $400; and that there was no discussion between them of the matter of Dorn's sending Communale the letter terminating the retainer arrangement in April, 1957 (Pet., pp. 9-10).

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[1] Figures in parentheses followed by the letter "a" refer to the pages of petitioner's printed Appendix in the Court of Appeals. Figures preceded by the letters "Tr." refer to the pages of the original typewritten transcript of the trial minutes, which is on file with the Clerk of this Court. Emphasis throughout is supplied.

The Government's basic reliance is on Dorn's testimony that when petitioner allegedly gave him Communale's name, Dorn related the incident in his own mind to his conversation with petitioner of about a year earlier when he had allegedly said that he would "do what [he] could", "if there was a way [he] could do it", to meet what he testified was merely an "understanding" in his own mind that he had "committed himself" to the payment of $100 a week (244a, 372a, 238a-240a, 326a).

Dorn made it clear, however, that he said nothing about this to petitioner and that nothing that petitioner said led him to that conclusion (387a). Manifestly, the undisclosed functioning of Dorn's mind at the time, howsoever relevant to show his fear, would not suffice as proof of petitioner's intent. The Government's contention (br., p. 14) that "There was no other explanation for petitioner's action", amounts to nothing more than an impermissible resort to conjecture and suspicion in place of evidence. Cf. *Ingram* v. *United States*, 360 U.S. 672, 680 (1959).

B

As regards the Trial Court's charge on aiding and abetting (Pet., pp. 16-18), there is no merit to the Government's contention (br., p. 17) that that charge was proper at least insofar as it might have reference to Castellito. The charge advised the jury that they could find petitioner guilty on the theory of having aided and abetted another to commit the crime charged in the indictment "without proof that he personally did every act constituting the offense charged" (696a-697a). In that context the charge clearly referred solely to Communale. It had no relevant application to Castellito, since Castellito was not shown to have committed any act that was not committed also by peti-

tioner (see 321a-322a). Indeed, Castellito was not present at all when petitioner allegedly gave Communale's name to Dorn (279a). The excerpt quoted by the Government (br., p. 17, n. 11) from petitioner's testimony, affords no support for the Trial Judge's charge on aiding and abetting, since there was no evidentiary basis whatever for a finding that Castellito did anything in connection with the matters at issue in which petitioner did not also personally participate.

Contrary to the Government's mere say-so (br., p. 17), there was likewise no evidentiary basis—and the Government cites none— for any finding that Communale was a principal in the alleged crime, or in any way conspired or collaborated with petitioner or even knew him, or knew that petitioner had anything to do with the retainer. By contrast, in *Meredith* v. *United States*, 238 F. 2d 535 (4th Cir. 1956), on which the Government relies (br., p. 18), there was ample evidence to support a jury finding that the third parties to whom the aiding and abetting instruction applied had themselves committed the crime charged of making false entries and "were principals in the commission of a crime" (pp. 542-3).

There is likewise no merit to the Government's further contention (br., p. 18) that the question cannot be considered by this Court because it was not properly raised at the trial. This Court thus clearly has "the power to notice a 'plain error' though it is not assigned or specified." *United Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 412 (1947); *Silber* v. *United States*, 370 U.S. 717, 718 (1962). Nothing could be plainer error and more prejudicial to a defendant's substantial rights than an instruction permitting the jury to convict him on the basis of the acts and

knowledge of a third person who is in no way shown to have conspired or collaborated with him.

Further, it has been recognized that Rule 30 of the Federal Rules of Criminal Procedure is to be given a practical construction, with due regard to its purpose of giving the Trial Court an opportunity to correct possible error (*United States* v. *Currens*, 290 F. 2d 751, 759 [3d Cir. 1961]), and "does not require a lawyer to become a chattering magpie" (*United States* v. *Kelinson*, 205 F. 2d 600, 601-2 [2d Cir. 1953]). Its requirements are relaxed where the Trial Court is sufficiently aware of the party's position. *Cf. United States* v. *Kelinson, supra; United States* v. *Currens, supra;* see also *Sweeney* v. *United Feature Syndicate*, 129 F. 2d 904, 905-6 (2d Cir. 1942).

In the present case defense counsel advised the Trial Court that he was excepting to "that portion of your charge with regard to aiding and abetting wherein your Honor said that guilt may be established without direct proof of knowledge of the crime on the defendant" (719a)—obviously a reference to the basic thrust of the judge's charge, permitting the jury to find guilt on the theory of aiding and abetting "without proof that . . . [the defendant] personally did every act constituting the offense charged" (696a). Associate defense counsel further made it clear that the objection was to the "charge *on the theory of* aider and abettor" (724a, 725a), and he specifically called the court's attention to its error in charging petitioner as a possible aider and abettor of Communale as a purported principal (724a). Indeed, the Trial Judge himself suggested that counsel enter a "general exception" to the entire charge (722a). It is thus hypertechnical for the Government here to urge that petitioner is foreclosed from

raising the question in this Court because his counsel did not spell it out with absolute precision at the trial. See *United States* v. *Currens, supra,* 290 F. 2d at 759; *Golden* v. *United States,* 318 F. 2d 357, 360 (1st Cir. 1963).

3. Access to Grand Jury Testimony of Key Government Witnesses (Pet., pp. 18-22).

The Government has completely failed to meet the issues raised in the petition. Its assertion (br., p. 12) that "there was no indication of any 'particularized need' ", is refuted by the record (Pet., p. 19). Contrary to the Government's claim (br., p. 12), the mere fact that other statements given by Dorn were made available to petitioner, and that Dorn's cross-examination was extensive, affords no basis for denying petitioner access to Dorn's relevant Grand Jury testimony. The Government further begs the question by citing the Trial Court's decision to withhold the Grand Jury testimony, after reviewing the same, on the ground that "the withholding would not be detrimental to petitioner."

Lawn v. *United States,* 355 U.S. 339, 362-3, n. 16 (1958), on which the Government relies (br., p. 13), is distinguishable, since the question there sought to be raised was not even mentioned in the petition for certiorari. The *Lawn* case is further distinguishable since it would have been futile for petitioner here to raise the question relating to denial of access to Grand Jury minutes in the court below, in view of the strict and narrow approach taken on the question by that court, whereas the *Lawn* case arose in the Second Circuit, which has a far more liberal rule in that regard (see Pet., pp. 21-2).

4. Sequestration of the Jury (Pet., pp. 22-26).

There is no merit to the Government's contention (br., p. 18) that petitioner could not have been prejudiced by

the sequestration order because provision was made for the jurors' comfort and convenience, and the court informed the jurors that it had ordered the sequestration because it had decided that it was "necessary for the appropriate performance of your function as jurors in this case" (140a-141a). The Government ignores the potential for prejudice inherent in a sequestration order, in causing the jury to speculate that it is attributable to some questionable conduct on the part of the defendant or his counsel, and that the case on trial is for some reason one out of the ordinary. The Trial Judge indeed at one point advised counsel that he would instruct the jury "fully" in his charge that they were not to accord the sequestration order any special significance (129a-130a), but he failed to do so, though so requested by defense counsel (752a).

The Government's other contentions (br., p. 19) are all premised on the assumption that the jury was completely insulated from the prejudicial publicity, even though there was a distinct possibility that some of the jurors heard an early morning newscast concerning the incident prior to their coming to court, and even though the jurors were permitted to see monitored television programs which would not insulate them from spot news broadcasts. It would have been a simple matter for the court, as requested by defense counsel, to interrogate the jurors *in camera* to ascertain whether any of them had read or heard any of the prejudicial publicity.[2]

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[2] The Government (br., p. 19, n. 12) urges that the question proposed by petitioner's counsel for the requested interrogation of the jurors contained objectionable language. The question which it cites was one proposed by petitioner's counsel at the close of the Government's case (474a), by way of renewal of repeated requests for such interrogation which he had earlier made. The earlier requests (755a-756a, 83a, 136a-138a) did not contain the allegedly objectionable matter.

5. Unit of Prosecution (Pet., pp. 26-28).

United States v. *Tolub*, 309 F. 2d 286 (2d Cir. 1962) cannot be distinguished, as urged by the Government (br., p. 11), on the ground that the evidence there showed that "each payment proceeded from a separate extortion". Tolub was convicted on twelve counts, ten of which related to ten $100 weekly payments made between August 23 and October 25, 1955. The $100 weekly sums, together with earlier similar payments (on which prosecution was barred by limitations), had been paid pursuant to a single extorsive agreement made in 1952. As Judge Friendly pointed out in a concurring opinion, there was "no evidence of any repetition of threats by Tolub between August 23 and October 25, 1955, and only the vaguest evidence as to how the ten $100 weekly payments during that period were made" (309 F. 2d at 290). Applying the principle of cases involving situations "where each of many acts forwarding a single underlying purpose was a separate offense", the Court held that Tolub's acceptance of each $100 payment "during the continuance of the same underlying conditions was a separate act of extortion" (309 F. 2d at 289). The *Tolub* situation was thus entirely analogous to the case at bar.

Contrary to the Government's assertion (br., p. 12), the Trial Judge's charge, including the excerpt quoted by the Government, did not clearly advise the jurors that they could convict only upon finding that the payments made in the post-limitation period were themselves impelled by fear;[3] it instead directed the jurors' attention only to the

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[3] The Government's statement of facts (br., p. 7) implies that Dorn testified that he made all the payments to Communale because he felt "it was necessary for the continuance of the terminal". The record

question whether the original retainer agreement in the pre-limitation period was procured by fear, and permitted them to convict merely upon finding that payments made in the post-limitation period were the product of the original retainer agreement (701a-702a).

6. Restriction of cross-examination (Pet., pp. 28-30).

The Government's contention (br., pp. 13-14) that the question to which objection was sustained was improper as calling for a legal conclusion, has already been dealt with in the petition (pp. 29-30). The question was clear and precise, particularly in the light of the questions and answers which preceded it (331a-333a), and it cannot be dismised as "vague" or "argumentative"—objections nowhere suggested at the trial.

Nor may the Court's error in sustaining the objection be disregarded because of defense counsel's failure to pursue the matter further. *Cf. Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515, 519 (2d Cir. 1952). Indeed, the Trial Court admonished defense counsel on a number of occasions not to continue to pursue any line of inquiry to which objection had been sustained (Tr. 990, 869, 913, 921).

7. Reasonable fear (Pet., pp. 30-31).

While the Trial Court on a number of occasions during the charge instructed on the issue of fear as an element of extortion (695a, 698a, 701a, 702a, 711a), it nowhere charged that the inducing fear must be a reasonable one under all

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reference cited by the Government (249a) shows, however, that the answer quoted by it was in response to a question which asked, "What was the reason which made you make the payments *in the first place*, Mr. Dorn?"

the circumstances presented. The Government (br., pp. 14-15) has completely failed to meet that issue.

8. Refusal to submit issue of bribery (Pet., pp. 31-32).

The Government's contention (br. p. 15) that there "was no evidence whatever suggesting bribery", is refuted by the record (Pet., pp. 31-32). Nor is it material, as urged by the Government, that petitioner denied that he received any of the payments in question. The rule is thus well settled in the Federal courts that a defendant is entitled to "instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility". *Tatum* v. *United States*, 190 F. 2d 612, 617 (D.C. Cir. 1951); *United States* v. *O'Connor*, 237 F. 2d 466, 474 (2d Cir. 1956); *Perez* v. *United States*, 297 F. 2d 12, 15-16 (5th Cir. 1961).

The cases cited by the Government are readily distinguishable. In *Bianchi* v. *United States*, 219 F. 2d 182 (8th Cir. 1955), cert. den. 349 U.S. 915, the Trial Court did instruct the jury, as requested by the defendant, that the mere receipt of money or other thing of value by a union representative from an employer would not of itself be sufficient to constitute an offense under the Hobbs Act (p. 192). Similarly, in *United States* v. *Blount*, 229 F. 2d 669 (2d Cir., 1956), the Trial Court did charge the jury on the issue of bribery (p. 670).

CONCLUSION

For the reasons set forth above and in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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